IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No. 69 of 2004
In
O.J. MISC. CIVIL APPLICATION No. 175 of 2003
In
OFFICIAL LIQUDATOR REPORT No. 49 of 2003

with
O.J. CIVIL APPLICATION NO.131 of 2004
in
O.J. APPEAL No.69 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VALJI KHIMJI & COMPANY - Appellant(s)
Versus
O.L.OF HINDUSTAN NITROPRODUCT (GUJARAT) LTD. & 8 - Opponent(s)

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Appearance :
MR.MIHIR THAKORE FOR MR. NITIN K MEHTA for appellant.

NOTICE SERVED BY DS for Respondent No(s).: 1, 2, 3, 4,6.
MR SR KOSHTI for Respondent No(s).: 5.
MR SUNIT S SHAH for Respondent No(s).: 7.
NANAVATI ASSOCIATES for Respondent No(s).: 8.
None for Respondent No(s).: 9.
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Coram: HONOURBALE MR.JUSTICE R.S. GARG &

HONOURABLE MR.JUSTICE RAVI R. TRIPATHI

Date : 25/08/2005

ORAL JUDGMENT (Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. The present is an appeal by a dissatisfied purchaser against the order dated 10.09.2004 passed on O.J. Misc. Civil application No.175 of 2003 in Company application No.311 of 2004 in Official Liquidator's Report No.49 of 2003 made in Company Petition No.242 of 1997. The facts necessary for disposal of the present appeal are that after Messrs Hindustan Nitroproduct (Gujarat) Ltd. was put under liquidation and Official Liquidator was appointed. All the properties belonging to the company were proposed to be auctioned. The Court accordingly asked the Official Liquidator to obtain valuation report. The Official Liquidator submitted to the Court that the valuation

according to the Official Valuer was amounting to Rs.2.55 crores only. The property was thereafter put for auction. Certain bids were received and were opened in the Court. In the Court auction the present appellant-Messrs Valji Khimji & Company made higher offer to the tune of Rs.3.51 crores. With the consent of the learned advocates representing the secured creditors, the said bid was accepted and sale was ordered to be confirmed in favour of the present appellant (hereinafter referred to as “buyer”). The sale was confirmed on 30.07.2003. The Court directed the appellant-Messrs Valji Khimji & Company to deposit 25% of the purchase price, i.e. Rs.63,98,000/- within 30 days from the said day and to deposit the balance within three months next. The Court also directed that the amount may be deposited in instalments, but no instalment shall be lesser than Rs.5 lakhs. The Court also observed that in case of default of payment as directed by the Court or for non observance of any of the terms and conditions of sale the amount of earnest money shall be forfeited. The Court directed that the draft sale deeds may be produced by the purchaser which the Official Liquidator may approve and execute the same in favour of the buyer. Certain other conditions were also incorporated

in the said order with which we are not concerned at this stage. It is to be noted that on 22.10.2003 respondent no.8-Messrs Manibhadra Sales Corporation wrote a letter to the Official Liquidator asking him that he was ready and willing to purchase the property in a sum of Rs.3.75 crores. He also submitted to the Official Liquidator that to show his bona fides he was submitting drafts valued for Rs.1 crore. On 23/24th October 2003 at least five weeks before the time given to the original buyer was to expire, he submitted Misc. Civil Application No.175 of 2003 repeating the same offer before the Court. It is to be seen that on 19.08.2003 the present appellant-buyer made an application to the Court that the property purchased by him be ordered to be transferred in favour of Messrs I.S. Dyestuff Industries Limited, the Official Liquidator be asked to execute sale deed and ancillary documents in favour of Messrs I.S. Dyestuff Industrial Limited and respondents no.2 to 4 of the said application be asked to cooperate in re-starting the subject company as early as possible for unutilised benefits to subsidiary company of the applicant-company. It is to be noted that the present appellant-buyer submitted to the Court that Messrs I.S. Dyestuff Industrial Limited was a subsidiary

company of Messrs Valji Khimji & Company, the present buyer and they were proposing to restart the factory. In the said application it was also submitted that Messrs I.S. Dyestuff Industrial Limited be allowed to enter upon the premises and carry out necessary repairs, etc. On 14.10.2003 the learned Company Judge observed that if 50% of the total amount of consideration is paid to the Official Liquidator, then the Official Liquidator would permit the applicant to enter into the property sold to him on usual terms and conditions for purposes of repairs and renovation.

5. It is also to be seen that during the pendency of Misc. Civil Application No.175 of 2003, on 24.11.2003 the present appellant-buyer deposited the balance amount.

6. It also appears from the records that while Misc. Civil Application No.175 of 2003 was pending consideration respondent no.9-Messrs Castwell Alloys Limited made Company Application No.311 of 2004 and submitted to the Court that he was ready and willing to purchase the property for a sum of Rs.5 crores. To show his bona fides he also made certain deposits.

7. Misc. Civil Application No.175 of 2003 and Company Application No.311 of 2004 were opposed tooth and nail by the present appellant-buyer. It was contended before the learned Company Judge that as the sale was completed and there was a concluded contract, just for a higher bid the concluded contract could not be set aside. It was also submitted to the learned Company Judge that the appellant had purchased the property as a scrap and therefore, if he was paying Rs.1 crore more, then for no good reason it could be observed that the property of the company is being sold at a lesser price. It was also contended before the learned Company Judge that any subsequent offer made either by Messrs Manibhadra Sales Corporation or Messrs Castwell Alloys Limited would not reverse the clock nor would permit the Court to set aside a completed contract in performance of which the present appellant had deposited good money.

8. The learned Company Judge, after hearing the parties, after considering the pros and cons and legality involved, by its order dated 10.09.2004 observed that the Court being the custodian of the property, cannot allow the property to be squattered or

be thrown away at a lesser price. The Court also observed that while carrying out valuation the potential of restarting the company was overlooked and the assets were valued as scrap. The learned Company Judge also observed that intangible assets referred to in its order were totally overlooked. The Court observed that the buyer had offered Rs.3.51 crores, as its scrap value, while the intention of the buyer to restart the company was not disclosed to the Court. The Court recalled the order dated 30.07.2003, required the Official Liquidator to obtain fresh valuation and directed further a fresh auction. It also directed that the loss of interest be paid to the present appellant.

9. Being aggrieved by the said order the appellant-original buyer is before this Court.

10. Mr.Thakore, learned counsel for the appellant placing reliance upon certain judgements of the Supreme Court submitted that a concluded contract unless there are very special and strong reasons and circumstances could not be set aside or annulled by the learned Company Judge. His submission is that if the valuation of the property was Rs.2.55 crores only

and the present appellant offered Rs.3.51 crores, then it cannot be said that the price offered by the present appellant was less than what was recorded by the Court while accepting the valuer's report. His submission also is that if the contract was concluded then any offer which comes subsequently will have to be rejected because if such offers are accepted then there would be no end to litigations and no finality would be attached to the concluded contract. Placing reliance upon the judgement of the Supreme Court in the matter of (i) **Messrs Kayjay Industries (P) Limited Vs. Messrs Asnew Drums (P) Limited and others, (1974) 2 SCC 213**; (ii) **Prakash Industries Limited Vs. Development Credit Bank Limited & another,** (2002) 6 SCC 424; (iii) **Beg Raj Singh Vs. State of U.P.,** A.I.R. 2003 SC 833; (iv) **Navalkha and Sons Vs. Sri Ramanya Das and others**, A.I.R. 1970 SC 2037; and (v) **Consolidated Coffee Limited Vs. Coffee Board, Bangalore**, A.I.R. 1980 SC 1468. It was submitted that the concluded sale or sale which was confirmed could not be set aside.

11. Learned counsel for the respondents on the other hand submitted that the dead company cannot be equalled to dead animal so that any person can have

a pound of flesh and enjoy the same. According to them the Court being custodian of the property, of the company which is under liquidation, is always required to see that no loss is occasioned to the company or its secured creditors by any act of the Court. They also submitted that it would not be correct to say that the appellant was purchasing the property for its scrap value because from Company Application No.431 of 2003 it would clearly appear that the appellant had purchased the property knowing about its potential and wanted the sale deed to be executed in favour of Messrs I.S. Dyestuff Industries Limited with a further prayer to the Court that respondents no.2 to 4 be asked to offer cooperation so that the unutilised benefits are utilised by Messrs. I.S. Dyestuff Industries Limited. It is also submitted by them that within two months from the confirmation of sale, Messrs Manibhadra Sales Corporation raised its offer by Rs.24 lakhs and within almost about a year or 15 months Messrs Castwell Alloys Limited raised its offer to Rs.5 crores. It is submitted on their behalf that the present is not the case where the property was purchased for its scrap value only. According to respondents no.8 and 9 there was a calculated move on the part of the appellant to purchase

the property for a throw-away price, restart the factory and get all other benefits to which the erstwhile company was entitled. They submit that the present is a case where the respondents are agreeable to purchase the property for the offer made by them.

12. So far as the question relating to purchase of the property for its scrap value is concerned we must immediately turn down the submission made by the appellant. The appellant made Company Application No.431 of 2003. The Judges Summons were taken out, it was stated in para 3 of Company Application No.431 of 2003 that the applicant-company (buyer) with the help of Messrs I.S. Dyestuff Industrial Limited wanted to restart the subject industry and intended to start manufacture of Anyline Oil, Nitro Benzine, Acetrantide, Rubber Chemical and Dyes Intermediate besides other Pharmaceutical and Agro Chemical products, etc. It was also stated that more than 100 employees would get employment, more particularly when the company is situated at a remote and interior backward areas. Other submissions were also made in the said application. The application was signed on 19th August 2003. It is to be seen that the application was

prepared and signed within 19 days of the confirmation of sale. The prayers made in the application were that the Company Court may allow the the buyer company as well as Directors of Messrs I.S. Dyestuff Industries Limited to enter upon the subject property for the purposes of repairs, renewal, renovation, etc. It was also prayed that the Official Liquidator be asked to execute deed of sale and ancillary documents in the name of Messrs I.S. Dyestuff Industries Limited. It was also prayed to the Court that direction be issued to respondents no.2 to 4 to cooperate in restarting the subject company as early as possible for unutilised benefits to subsidiary company of the petitioner company. From these statements it would be clear that the appellant on day one knew that what would be the potential of the property. He was not purchasing the scrap, was not purchasing the dead animal. He was in fact, purchasing the industry which c`ould be restarted and the appellant could utilise the unutilised benefits. The appellant knew well that he was purchasing the property either for his own self or for Messrs I.S. Dyestuff Industries Limited. The appellant made a clear statement that Messrs I.S. Dyestuff Industries Limited is a subsidiary-sister concern of

the applicant-company and buyer company, with the help of Messrs I.S. Dyestuff Industries Limited wanted to restart the subject company. It is not that within 19 days from the confirmation of the sale anything special came into existence and the present appellant-buyer became wiser within 19 days when it made an application to the Court saying that respondents no.2 to 4 be asked to cooperate in starting the company so that the subsidiary company/ sister company of the appellant-buyer gets unutilised benefits. It would, therefore, be incorrect to argue that the appellant was purchasing the property as scrap. The learned Single Judge was of the opinion that the property was valued as scrap and the scrap value at Rs.2.55 crores was not bad. The learned Company Judge in the considered opinion of this Court was absolutely justified in observing that the potential of restarting the company was overlooked. The learned Judge was also justified in observing that the intangible assets referred to in its order were totally overlooked. The Court was also justified in observing that the buyer had offered Rs.3.51 crores as its scrap value while the intention of the buyer of restarting the company was not disclosed to the Court. The learned Company Judge has also observed

that number of benefits were to be given to the company under liquidation and such unutilised benefits were also required to be taken as intangible property of the company while fixing valuation.

13. Mr.Thakore, learned counsel vehemently submitted that if the property of the company is sold to any third party, then such third party after purchase of the property may not be entitled to the benefits which were extended in favour of the company under liquidation. This submission would assume some importance if the other purchasers were to seek relief from the Court that the Government be asked to extend benefits which were extended in favour of the company under liquidation. They have come out with a straight offer that one of them was ready and willing to pay Rs.3.75 lakhs while the other is ready and willing to pay Rs.5 crores. Ordinarily, we could have interfered in the matter if the price escalation was not much. But by no stretch of imagination it can be said that Rs.5 crores in comparison to the offer of Rs.3.51 crores would be a pittance. It is substantial money. It is good amount. When the Court is custodian of the properties of the company under liquidation, then the Court has to consider all the

pros and cons and it cannot allow the property of the company to be sold for a song.

14. Mr.Thakore, learned counsel while referring to the judgement in the matter of **Consolidated Coffee Limited** (supra) submitted that on the knock of hammer a complete sale would come into existence and as in the present case by considered order, the Court has completed sale, the same cannot be set aside. In our considered opinion the principles of sale applicable to movables would not apply to immovable property. In a case of sale of movables on payment of price and transfer of possession of the movables the sale is complete. In a case of immovable tangible property worth more than Rs.100/- document of sale is required to be executed under section 17 of the Indian Registration Act; unless such document is executed despite payment of the price or confirmation of sale, sale would not stand completed. The judgement in the matter of **Consolidated Coffee Limited** (supra) would have no application to the facts of the present case.

15. Strong reliance was placed upon the judgement of the Supreme Court in the matter of **Messrs Kayjay**

Industries (P) Limited (supra) to contend that if the Court had exercised a conscientious and live discretion in concluding the sale, then the same cannot be set aside. In the said case the sale was knocked out at Rs.11.5 lakhs while market value was over Rs.17 lakhs. The Supreme Court observed that sale proceedings had been pending too long and the first respondent/ judgement debtor could not even when given the opportunity produce buyer by private negotiations. The Supreme Court also observed that the valuer's report was also not produced. Under the set of circumstances the Supreme Court held that the sale made in favour of the auction purchaser could not be turned down.

16. In the matter on hands the property was valued as scrap. The potential value for restarting the factory and the value of unutilised benefits were never taken into consideration. In fact, nobody ever noticed the same. Nobody ever though that the dead company, could be infused some life under some different name and would again start production and on some day may claim benefits which were still unutilised. It was never brought to the notice of the Court or the Official Liquidator that the property in

fact was not a scrap, but was a factory which could be restarted. The Official Liquidator got the property valued as scrap and not with its potential or benefits to which the erstwhile company was entitled to. The submission of Mr.Thakore that the scrap value was Rs.2.55 crores and the petitioner was paying Rs.3.51 crores, therefore, there was no foul play, would have been justified, if Company Application No.431 of 2003 was not filed at the instance of the present appellant. We have already observed to the contents of Company Application No.431 of 2003, wherein the intention to restart the company either with the help of or in the name of Messrs I.S. Dyestuff Industries Limited is clearly mentioned. If the appellant knew about everything, then it would not lie in his mouth to say that he was paying good money for a dead company.

17. Reference was also made to the judgement of the Supreme Court in the matter of **Navalkha and Sons** (supra). There the sale was confirmed without looking into the adequacy of the price and the Supreme Court observed that, that was a good reason for setting aside the sale. Though the learned counsel for the appellant submits that the adequacy of the price if

was not considered by the Court, then that provides one reason to set aside the sale, but in the present case, the Court under its order dated 30.07.2003 did consider everything and as such there was no scope for interference.

18. The judgement on which strong reliance is placed in fact goes against the submission of the appellant. In the present matter the sale was confirmed after taking into consideration that the scrap was being sold. If the ratio of the judgement of the Supreme Court is applied, then the real valuation of the property including its potential to start the factory is also to be taken into consideration. In the present matter the property was valued as scrap which in fact, was not correct and real. The property ought to have been valued after taking into consideration its potential and the right of unutilised benefits and not as scrap. If ultimately, it is recorded by the Court that the property was under-valued because of ignorance of facts or for some reason akin to it, then the Court would not be unjustified in setting aside the sale which though was confirmed on an earlier occasion without taking into consideration the totality of the circumstances and the facts

which remain suppressed when the sale was confirmed.

19. Reference was also made to the judgement in the matter of **Prakash Industries Limited** (supra). After going through the said judgements we must immediately observe that these judgements have no relevance with the matter in issue.

20. The learned Single Judge in our considered opinion has given cogent reasons for recalling the order dated 30.07.2003 especially when the two predecessors before it were ready and willing to deposit Rs.1 crore as Earnest Money to show their bona fides and that one of them was ready and willing to purchase the property for not less than Rs.5 crores.

21. Learned counsel Mr.Thakore for the appellant submitted that though the property is fetching higher value but as the sale was complete the learned Single Judge was not entitled to set aside the sale which was confirmed by the conscious decision. In our opinion the present is not a case where the appellant has come out with a plea that within a period of one year or ten months there was a significant rise in the price of

scrap or steel or machinery. Therefore, somebody was offering Rs.1.5 crores in excess to what was offered by the appellant. In fact the endeavour of the appellant is to convince us on the point that the learned Single Judge was absolutely unjustified in taking into consideration the alleged potential of restarting the company, because no purchaser would be entitled to get such benefits which were granted in favour of the erstwhile company, now under liquidation. This objection too could hold some ground if the offer made by respondents no.8 and 9 was conditional. They have not asked the Court that while selling the property the Court should reserve certain rights in their favour. They have simply submitted that they are ready and willing to pay a particular price which is much higher than what has been offered by the present appellant.

22. Taking into consideration that the company is under liquidation it was entitled to certain incentives and benefits like sales tax, etc. and the company had made huge investments in development of an effluent treatment plant, the company had also received permission for supply of gas for fuel from GAIL, we must record that the learned Company Judge

was not wrong in observing that these intangible assets were required to be considered while fixing the value of the property.

23. While going through the order made by the learned Company Judge we found that the learned Company Judge had directed the proposed purchasers to deposit a sum of Rs.43,76,978/- in OJ Misc. Civil Application No.175 of 2003 and a sum of Rs.20,00,000/- in Company Application No.311 of 2004 and pay the same to the present appellant. In our considered opinion for the money which remained in deposit for about one year or so a sum of Rs.63 lakhs as interest cannot be awarded in favour of the appellant. The appellant would certainly be entitled to interest but only at the Bank rate which at present is 6% per annum. The amount which has been deposited by the proposed purchasers - intermediaries would certainly go to the account of the company as the company's account would be suffering a loss because if in October 2004 the property was offered and sold to Messrs Castwell Alloys Limited, then the company could receive Rs.5 crores or more and earn interest on it.

24. On the merits we find no reason to interfere,

but however, taking into consideration the totality of circumstances we direct that the appellant shall be entitled to interest at the rate of 6% per annum from the total of Rs.63,76,978/- from the date of different deposits upto the date of the order, i.e. 10th September 2004. The balance amount shall be credited in favour of the company under liquidation.

25. The O.J. Appeal is accordingly dismissed. The order of stay granted earlier is vacated. The prayer for its continuation is also rejected.

26. Consequently, OJ Civil Application No.131 of 2004 stands disposed of. Rule is discharged.

(R.S. GARG, J.)

(RAVI R. TRIPATHI, J.)

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